STATE OF MICHIGAN

COURT OF APPEALS

In re W. N. JOHNSON, Minor.

UNPUBLISHED
August 21, 2014

No. 320222
Wayne Circuit Court
Family Division
LC No. 10-496636-NA

Before: GLEICHER, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

A circuit court referee declined to terminate respondent mother's parental rights to WNJ, finding that termination would not serve the child's best interests. A circuit court judge affirmed the referee. The child's lawyer guardian ad litem claimed an appeal, contending that the circuit court clearly erred by failing to terminate respondent's parental rights. A different panel of this Court reversed the circuit court, finding the best-interest ruling clearly erroneous. The panel remanded for entry of an order terminating respondent's parental rights.

Respondent now appeals the termination order, asserting that she lacked appellate counsel in the prior appeal. The record confirms this claim. Respondent enjoyed constitutional and statutory rights to appointed appellate counsel when the L-GAL sought termination of her parental rights in this Court. Accordingly, we vacate this Court's termination order and remand for a new best-interests hearing.

I. UNDERLYING FACTS AND PROCEEDINGS

WNJ is respondent's fourth child. Respondent's eldest child died as an infant. The Wayne Circuit Court terminated respondent's parental rights to her other two children before WNJ's birth. Approximately six months after respondent delivered WNJ, the Department of Human Services (DHS) filed a petition seeking termination of parental rights at initial disposition. The DHS did not seek termination of the father's parental rights. Respondent's plea of admission to the petition established a statutory basis for termination under MCL 712A.19b(3)(*l*). A best-interests hearing then commenced before a circuit court referee.

At the best-interests hearing, a foster care worker testified that respondent consistently visited the child three times each week and that the supervised visits had "gone fairly well." The worker offered no information regarding respondent's living conditions. Respondent testified that she was enrolled in a peer counseling program at Advantage Health Centers, had obtained employment, and was participating in various programs to enable her to "raise the child." She

further indicated that she had checked herself out of a hospital where she was undergoing treatment for a respiratory infection to attend the best-interests hearing.

The referee found that WNJ's best interests would not be served by immediate termination of respondent's parental rights, and instead offered her a highly structured opportunity to plan for the child, combined with a warning that only "thin ice" separated her from a termination order:

> Admittedly by reviewing the clinic,[1] it paints a bleak outlook for mother ever to come into compliance, and mother, based on the testimony, didn't file the birth certificate. However, . . . I have to come up with what is best for this child, [WNJ]. And I have Mr. Johnson, who has now established paternity, who . . . wasn't a subject of the permanent custody, which is asking temporary custody. So it's unquestioned that . . . we found jurisdiction for the child. We did that several weeks ago . . . . Now I have to . . . figure out is it in the best interest of this child to terminate this mother's rights.
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> It's clear from the clinic, at this point in her life, mother does not have a lot of insight into her behavior. I recognize that she is a younger mother, and that there is a bond between her and this child, [WNJ]. I don't know what the extent of the current relationship between [respondent and Mr. Johnson] presently is. However, I do find and feel that at this point in time it is in the best interest to allow mother a chance to demonstrate that she can plan.
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> [B]ased on the fact that this child was in the mother's care previously, I'm stating that there is a bond. . . . Has this mother been perfect? Oh, by no means, not even close to perfect; and came very close to having her rights terminated today. And father I don't need you on the back row to sit there with your hands folded because, also you're on real thin ice also. Despite the fact that they have not ordered PC [probable cause] as to you, the both of you are on very thin ice. And so I want it clear that the both of these parents need to demonstrate and be in compliance with this service plan.
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> Although the clinic would say - - okay, neither really deserve a chance, specifically the mother. I'm going to give them a chance to demonstrate to this Court that they can be in compliance. And that means, mother, you'd better be in every single parenting class. I don't want - - we went through this long thing. I need documentation from everybody. And you'll do a drug screen after that. Also to the worker, follow up and get any hospital records in terms of why she was at the hospital. And as counsel for attorney [sic] . . . pointed out, I really

[1] The "clinic" is the Clinic for Child Study. A report authored by a psychologist associated with the clinic was admitted during the hearing.

> don't know why she was in the hospital, and what medication she was on. So at this point that's another reason I'm leaning to saying okay, at this point in time, we'll give this mother a chance. And it is in the best interest. And yes - - yes counsel, your client dodged a bullet on this one.
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> [T]his is a very disturbing - - very serious matter, and I need everybody to demonstrate that they're going to be in compliance. I want her to do a drug screen immediately after this. I want hospital follow up, and any record, in terms of employment. Mother says she's living - - has housing. Okay. All right. . . .

At the referee's request, the foster care worker dictated a lengthy list of recommended services, including individual therapy, parenting classes, a substance abuse assessment and treatment, domestic violence counseling, a psychiatric examination, and demonstration of suitable housing and a legal source of income. The referee ordered every service and evaluation proposed by the foster care worker, admonished respondent to follow through with the plan and to submit documentation of having obtained the required services, and scheduled another hearing in three months.

The DHS and the L-GAL asked the circuit court to review the referee's best interests decision. The circuit court approved the referee's recommendation. The L-GAL then filed an appeal in this Court.[2] Respondent was not notified of the appeal, and the circuit court did not appoint appellate counsel for her.

This Court concluded that termination of respondent's parental rights "is in the best interests of the child." *In re Johnson*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2013 (Docket No. 316211), unpub op at 2 (*Johnson I*). After summarizing evidence supporting that conclusion, this Court continued:

> While the referee's finding that a bond existed between respondent and the child is supported by a letter introduced into evidence, the existence of a parent-child bond was outweighed by other evidence in the record showing that termination of respondent's parental rights was in the child's best interests. Accordingly, we are left with a definite and firm conviction that the trial court committed a mistake in finding that termination of respondent's parental rights was not in the child's best interests. A preponderance of the evidence clearly established that termination of respondent's parental rights was in the child's interests. [*Id.* at 3.]

This Court remanded "for entry of an order terminating respondent's parental rights to the child." *Id.*

[2] Petitioner did not file a brief in the first appeal, and has not filed a brief in this appeal.

During the time that the L-GAL's appeal remained pending in *Johnson I*, proceedings continued in the circuit court. Evidence introduced at subsequent dispositional hearings reflects that respondent made steady progress toward compliance with the service plan. Six months after the referee declined to terminate respondent's parental rights, the foster care worker testified that respondent completed domestic violence and anger management therapy, had attended 34 out of 35 parenting time visits, was participating in weekly individual and group substance abuse counseling, and had seven clean drug screens. One screen was positive for benzodiazepines, which respondent claimed were prescribed. The worker admitted that the permanency plan was reunification and agreed that, in her opinion, reunification remained "an appropriate plan." The referee expounded:

> I give mother credit for, um, I know no service plan is ever perfect but taking part in most of the aspects of the parent/agency service plan and from where I sit it seems as though she's making progress. And, it's clear that, um, both these parents are trying to see this through and by that I mean both parents attend court regularly. . . . [A]t this point parents keep making progress and the plan is reunification. . . .

After receiving this Court's opinion terminating her parental rights in *Johnson I*, respondent requested appellate counsel. This appeal followed.

II. ANALYSIS

A. RESPONDENT'S RIGHT TO COUNSEL

Our Legislature has mandated that in child protective proceedings, the court must inform a respondent that she has a right to counsel "at each stage of the proceeding." MCL 712A.17c(4)(a). A respondent who is "financially unable to employ an attorney" must be told that the court will appoint an attorney on her behalf. MCL 712A.17c(4)(b). In MCR 3.915(B)(1), our Supreme Court delineated the procedures that must be employed in child protective proceedings to implement the statutory right to appointed counsel. The court rule contemplates that appointed counsel will represent an indigent respondent "at any hearing conducted pursuant to these rules" if the respondent requests counsel. MCR 3.915(B)(1).

In *Reist v Bay Circuit Judge*, 396 Mich 326, 339; 241 NW2d 55 (1976), the Supreme Court held that fundamental notions of fairness and equal treatment mandate the appointment of counsel for indigent parents in both trial *and* appellate settings. Justice Levin's plurality opinion elucidated as follows the constitutional rationale for appointed counsel in the trial court:

> The interest of parent and child in their mutual support and society are of basic importance in our society and their relationship occupies a basic position in this society's hierarchy of values. Clearly any legal adjustment of their mutual rights and obligations affects a fundamental human relationship. The rights at stake are "protected" and encompassed within the meaning of the term "liberty" as used in the Due Process Clause. [*Id*. at 342-342(citation omitted).]

Counsel is equally important, Justice Levin explained, in the appellate realm:

> The issues on appeal from an order terminating parental rights are generally both factual and legal. Prosecution of an appeal requires a knowledge and understanding of the court rules, statutes and judicial decisions. The procedures for prosecuting an appeal are intricate and, to one not experienced in appellate work, complex. [*Id*. at 348.]

The *Reist* Court held that counsel must be supplied to represent indigent parents "at hearings which may involve termination of their rights." *Id.* at 346. According to the plurality, "Because of the nature of parental rights termination proceedings and of the basic, fundamental nature of the parental relationship in our society, the Due Process Clause requires assignment of counsel at public expense for an indigent for hearings when the state seeks to terminate his parental rights." *Id*. Based on similar reasoning, the *Reist* plurality concluded that "indigent parents are entitled to meaningful and adequate access to the appellate process and that this right can only be achieved through the representation by counsel and providing counsel with necessary transcripts." *Id.* at 349 (citation omitted).

This Court has explicitly recognized the constitutional underpinnings of the right to counsel in parental rights termination cases. Citing *Reist*, we stated in *In re Cobb*, 130 Mich App 598, 600; 344 NW2d 12 (1983): "[T]he constitutional guarantee of due process confer[s] to an indigent parent the right to appointed counsel at a hearing which may involve termination of parental rights." And in *In re Powers Minors*, 244 Mich App 111, 121; 624 NW2d 472 (2000), we observed: "The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel." These pronouncements flow from our understanding that parent, child and L-GAL "share a vital interest in preventing erroneous termination" of the "natural relationship" between a parent and his or her child. *Santosky v Kramer*, 455 US 745, 760; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Hence, when an indigent parent's right to the care and custody of his or her child are at stake, constitutional principles weigh in favor of appointing counsel.

Against this backdrop, we must set aside the circuit court's order terminating respondent's parental rights. We ground our decision on the legislative mandate that counsel assist an indigent parent "at each stage of the proceeding." Although neither this Court nor the Supreme Court has defined the term "proceeding" as used in MCL 712A.17c(4)(a), the term indisputably encompasses a best-interest hearing conducted pursuant to MCL 712A.19b(5). It logically follows that an L-GAL's interlocutory challenge to a referee's best-interest finding qualifies as a "stage in the proceeding" when the relief sought is the termination of parental rights. Alternatively stated, we find implicit in the Legislature's pronouncements concerning the appointment of counsel in child welfare cases that the absence of counsel undermines the integrity of a termination order. Consequently the circuit court was obliged to inform respondent of her right to appellate counsel when the L-GAL claimed an appeal. MCL 712A.17c(4)(a). That the L-GAL sought appellate termination of respondent's parental rights heightened the statutory and constitutional imperatives for appointed counsel. Without counsel during the first appeal, respondent was deprived of "an adequate opportunity to present [her] claims fairly within the adversarial system" *Reist*, 396 Mich at 339. Accordingly, we vacate the order terminating her parental rights.

B. LAW OF THE CASE

Although not raised by the parties, we have considered whether the law of the case doctrine forecloses our ability to vacate a prior order of this Court, and in particular an order issued by a different panel.

"Whether the law of the case doctrine applies is a question that we review de novo." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). The law of the case doctrine is discretionary. It expresses a preference that courts "'maintain consistency and avoid reconsideration of matters once decided during the courts of a single continuing lawsuit.'" *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991), quoting Wright, Miller & Cooper, Federal Practice and Procedure, § 4478, p 788. However, the doctrine is not inflexible and must yield if it creates an injustice. *People v Robinson (After Second Remand)*, 227 Mich App 28, 33; 575 NW2d 784 (1997). In *Locricchio*, 438 Mich at 109-110, a defamation case, the Supreme Court determined that the doctrine should not have precluded this Court's "second review" of a decision, explaining that "in a libel case affecting constitutionally protected public discourse, the law of the case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts." We find *Locricchio* instructive. The law of the case doctrine, designed to protect efficiency and finality, cannot trump the right of a parent to the assistance of appellate counsel. To hold otherwise would render illusory the statutory and constitutional requirements that counsel be afforded at all stages of parental rights termination proceedings, erecting an unnecessary barrier to rectifying a flawed appeal.

C. REMEDY

We have considered various remedies proposed by the parties, including the L-GAL's request that we simply redecide the issues presented to the previous panel. We decline this invitation. The best interests of the child will be better served by a decision based on up-to-date information. We remand for a continued best-interest hearing, at which the circuit court may consider all information gathered during the proceedings, and may supplement the record with current facts. All parties may present evidence. If the circuit court declines to terminate respondent's parental rights, the L-GAL or petitioner may claim an appeal. Should either do so, the circuit court must appoint appellate counsel for respondent.

We vacate and remand. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause